UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUSTAFA FTEJA, Plaintiff, vs. FACEBOOK, INC., Defendant.	Civil Action No. 1:11-cv-00918 (RJH) (MHD)

FACEBOOK, INC.'S REPLY IN SUPPORT OF ITS MOTION TO TRANSFER VENUE, MOTION TO DISMISS, AND MOTION FOR A MORE DEFINITE STATEMENT

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

A. The Court Should Transfer This Case to the Northern District of California 1

1. Fteja Knew of and Agreed to Facebook's Terms of Service and Facebook Provides Clear and Prominent Notice of Its Terms. 2

2. Facebook's Forum-Selection Clause Is Reasonable and Legitimate 5

3. Fteja's Purported Illness Is not an "Exceptional Fact" Sufficient to Relieve Him of His Contractual Duty to Litigate in California 6

4. Other Relevant Factors also Favor Transfer under 28 U.S.C. § 1404(a) 6

B. Fteja's Claims Should Be Dismissed Under Federal Rule of Civil Procedure 12(b)(6) 8

1. Fteja's Discrimination Claim Is Conclusory and Meritless 8

2. Fteja Cannot Succeed on Any Conceivable Tort Claim 9

C. The Court Should Order Fteja to Provide a More Definite Statement of His Claims 10

CONCLUSION 11

INTRODUCTION

In his complaint, plaintiff Mustafa Fteja says Facebook was wrong to disable his free Facebook account because he complied with all of the terms of service in Facebook's Statement of Rights and Responsibilities. *See* Complaint ("Compl.") ¶ 8. Thus, from the outset, Fteja admitted that he knew of and agreed to comply with Facebook's terms. But now that Facebook has pointed out that its terms include a binding forum-selection clause, Fteja seeks to retract that admission. Specifically, he says that he does "not remember agreeing to [Facebook's] forum selection clause or agreeing to any Facebook agreement" when he registered to use Facebook. Dkt. 17 at 1 (ECF pagination). The Court need not and should not credit that self-serving claim, particularly in light of Facebook's sworn evidence to the contrary. Fteja also tries to avoid transfer or dismissal by adopting arguments set forth in the 39-page "Memorandum of Law" filed by non-party Dimitrios Fatouros.[1] But Fatouros's arguments are incorrect, irrelevant, or both. This case should be transferred or dismissed.

ARGUMENT

A. The Court Should Transfer This Case to the Northern District of California

An agreement to litigate in a specific forum is "a significant factor that figures centrally" in determining whether a case should be transferred under 28 U.S.C. § 1404(a). *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). In fact, "the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors." *P & S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (internal quotation marks and citation omitted). As a result, "a party opposing enforcement of a forum selection clause must

[1] Fteja's opposition papers seem to be incomplete. *See, e.g.*, Dkt. 17 at 2-3 (ECF pagination) (omitting paragraphs 11 to 15). Facebook responds only to the arguments in Fteja's papers as filed.

demonstrate exceptional facts" to avoid transfer. *Mpower Commn's Corp. v. VOIPLD, Inc.*, 304 F. Supp. 2d 473, 475 (W.D.N.Y. 2004) (internal quotation marks and citation omitted).

Fteja does not dispute those basic legal principles. Nor does he deny that he completed Facebook's registration process; that the registration process requires consumers to agree to Facebook's Statement of Rights and Responsibilities (*i.e.*, Facebook's terms of service); or that Facebook's terms includes a forum-selection clause requiring users and former users to sue Facebook exclusively in California. Nevertheless, Fteja opposes transfer on the grounds that

- He did not agree to Facebook's terms of service (as a matter of fact) and Facebook provides inadequate notice of its terms (as a matter of law);
- Facebook's forum-selection clause is unenforceable because it is intended to discourage legitimate claims;
- It would be inconvenient for him to litigate in California due to an illness; and
- Other relevant factors favor keeping this case in New York.

Fteja is wrong on all counts.[2]

1. Fteja Knew of and Agreed to Facebook's Terms of Service and Facebook Provides Clear and Prominent Notice of Its Terms

Fteja's claim that he never knew of or agreed to Facebook's terms fails for at least two reasons. First, it contradicts the record: Facebook has provided sworn evidence showing that Fteja (like all users) was required to agree to Facebook's terms in order to use Facebook. *See* Declaration of Ana Yang ("Yang Decl.") ¶¶ 5-15. *See also Feldman v. Google Inc.*, 513 F. Supp. 2d 229, 233 (E.D. Pa. 2007) (plaintiff denied agreeing to terms of service; court found that plaintiff agreed to terms because plaintiff failed to dispute evidence that he completed online registration process). Second, it contradicts Fteja's allegations: In his complaint, Fteja insists that Facebook wrongly disabled his account because he "adher[ed] to [Facebook's] terms of service." Compl. ¶ 8. Thus, by his own admission, Fteja was fully aware of Facebook's terms and his obligation to adhere to those terms. He is therefore bound by those terms. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) ("It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly becomes binding on the offeree."). *See also Miller v. Facebook, Inc.*, No. 09-2810, slip op. at 2-3 (N.D. Ga. Jan. 15, 2010) (attached as Exhibit A to the Declaration of Justin N. Kinney dated April 4, 2011 ("First Kinney Decl."), Dkt. 5-1).

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[2] Most of those arguments are raised only in Fatouros's papers. But because Fatouros is not a party to this case, and because Fteja adopts Fatouros's arguments in whole, *see* Dkt. 17 at 3 (ECF pagination), Facebook attributes the arguments to Fteja.

Fteja also argues that Facebook provides inadequate notice of its terms as a matter of law. That argument is irrelevant because Fteja—the only plaintiff in this case—knew of and agreed to those terms. It is also wrong. Fteja acknowledges that anyone who attempts to register for Facebook encounters a webpage with a button labeled "Sign Up." *See* Dkt. 17 at 22 (ECF pagination). Consumers cannot register to use Facebook without affirmatively clicking that button. *See* Yang Decl. ¶¶ 5-15. Immediately below the "Sign Up" button, consumers are told that "[b]y clicking Sign Up, you are indicating that you have read and agree to the Terms of Use and Privacy Policy." Dkt. 17 at 22 (ECF pagination). The words "Terms of Use" are hyperlinked to Facebook's terms of service, prompting consumers to read the terms before clicking the "Sign Up" button.[3] This form of pre-registration notice is not—as Fteja puts it—"invisible" and "deceptive." *Id.* To the contrary, it is prominent and unambiguous. Moreover, Facebook continues to notify users of its terms after registration by placing hyperlinks to the terms at the bottom of every Facebook webpage. *See* Willner Decl. ¶ 3.

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[3] The registration process was essentially identical at the time Fteja registered to use Facebook. *See* Accompanying Declaration of David Willner ("Willner Decl.") ¶ 2.

Thus, as at least two courts have recognized, no reasonably prudent person could register for and use Facebook without understanding that he thereby agreed to Facebook's terms. *See Facebook, Inc. v. Power Ventures, Inc.*, 2010 WL 3291750, at *7 n. 20 (N.D. Cal. July 20, 2010) ("[I]n the act of accessing or using the Facebook website alone, [defendant] acceded to [Facebook's] Terms of Use and became bound by them.") (attached as Exhibit A to the Accompanying Declaration of Justin Nolan Kinney ("Second Kinney Decl.")); *Miller*, slip op. at 3 (attached as Exhibit A to the First Kinney Decl.). And many courts have enforced online agreements using identical or similar forms of notice. *See, e.g., United States v. Drew*, 259 F.R.D. 449, 453, 461-62 & n.22 (C.D. Cal. 2009) (noting that courts have "routinely upheld" clickwrap agreements like Facebook's; enforcing online agreement where notice of terms was provided via hyperlinks to terms); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1267, 1271 (C.D. Cal. 2008) (enforcing online agreement where notice of terms was provided via hyperlinks to terms); *DeJohn v. The .TV Corp. Int'l*, 245 F. Supp. 2d 913, 916, 919 (N.D. Ill. 2003) (same). *See also A.V. v. iParadigms, Ltd. Liability Co.*, 544 F. Supp. 2d 473, 480 (E.D. Va. 2008), *aff'd in part, rev'd in part on other grounds*, 562 F.3d 630 (4th Cir. 2009).

Fteja relies almost entirely on *Specht v. Netscape Communications Corporation* to argue that Facebook's notice is insufficient. *See* 306 F.3d 17 (2d Cir. 2002). But *Specht* actually confirms the adequacy of Facebook's notice. In *Specht*, plaintiffs downloaded free software from Netscape's website. Netscape later argued that plaintiffs agreed to a license agreement when downloading that software, and thus were bound by that license agreement—including its arbitration clause. The *Specht* court found that the plaintiffs were not given adequate notice of the license agreement because the only reference to it on the applicable webpage "was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen," and "once these plaintiffs had initiated the download, the existence of [the] license terms was not mentioned while the software was running or at any later point in plaintiffs' experience of the product." *Id.* at 23.

Facebook's website suffers from neither of those flaws. Rather, clear and prominent text immediately below the "Sign Up" button notifies consumers of Facebook's terms before they register to use Facebook. *See, e.g.*, *Guadagno*, 592 F. Supp. 2d at 1271 (notice of terms was sufficient because a "reasonably prudent offeree would have noticed the link [to the terms] and reviewed the terms before clicking on the acknowledgment icon"). Facebook also provides notice after registration with hyperlinks at the bottom of every Facebook webpage. *See* Willner Decl. ¶ 3. In short, Facebook provides "immediately visible" and "reasonably conspicuous" notice of its terms both before and after registration. *Specht*, 306 F.3d at 31-32. Facebook's notice is therefore entirely adequate.

2. Facebook's Forum-Selection Clause Is Reasonable and Legitimate

Fteja further argues that Facebook's forum-selection clause is unenforceable because it is intended only to discourage legitimate claims. *See, e.g.*, Dkt. 17 at 29-30 (ECF pagination). He offers no support for that claim.

The truth is much more banal. Facebook interacts with people all over the country and across the globe. Thus, it has a legitimate and compelling interest in centralizing litigation near its headquarters. *See Miller*, slip op. at 3 ("If this court were to determine that the forum selection clause contained in Facebook's [terms of service] was unenforceable, the company could face litigation in every state in this country and in nations around the globe which would have potential adverse consequences for the users of Facebook's social-networking site and for other internet companies.") (attached as Exhibit A to the First Kinney Decl.). *See also Feldman*, 513 F. Supp. 2d at 242 ("Just as a cruise line has a special interest in limiting fora because it could be subject to suit where its passengers come from many locales, Defendant has the same interest where its internet users are located across the United States and the world.").

3. Fteja's Purported Illness Is not an "Exceptional Fact" Sufficient to Relieve Him of His Contractual Duty to Litigate in California

Fteja also suggests that it would be unfair to transfer this case because he has a medical condition that causes "spinning and dizziness." Dkt. 17 at 2 (ECF pagination). However, "a party opposing enforcement of a forum selection clause must demonstrate exceptional facts explaining why he should be relieved from his contractual duty." *Mpower Commn's Corp.*, 304 F. Supp. 2d at 475 (internal quotation marks and citation omitted) (emphasis added). Fteja's bare assertion that he suffers from a medical condition does not satisfy that requirement because it is unsubstantiated; his alleged symptoms are not severe; presumably he would experience the same symptoms if he litigated this case in New York; and the Northern District of California can easily accommodate his alleged symptoms. *See, e.g.*, *Feldman*, 513 F. Supp. 2d at 247 (transferring case to California despite plaintiff's heart condition in part because "accommodations can be made, such as . . . possible telephonic or video appearances, and, where possible, the scheduling of depositions to occur near Plaintiff's home").

4. Other Relevant Factors also Favor Transfer Under 28 U.S.C. § 1404(a)

In its opening brief, Facebook explained that the other factors courts consider in deciding transfer motions—including the convenience of the witnesses, the location of relevant documents, and the situs of operative facts—also favor transfer. In response, Fteja argues that the Court should not transfer this case because several witnesses (*i.e.*, his friends) are located in New York; relevant documents can be sent from California to New York; the relevant events occurred in New York; he is unemployed and hence has limited means; and he chose to litigate here. *See* Dkt. 17 at 30-35 (ECF pagination). Fteja is wrong on the facts and the law.

First, Fteja offers no evidence that his friends live in New York. More importantly, he makes no effort to show that any of his friends could offer relevant testimony. In contrast, Facebook has provided sworn evidence showing that it will rely principally on the testimony of Facebook employees located in California. *See* Yang Decl. ¶ 3. Thus, the convenience-of-the-witnesses factor strongly favors transfer. *See, e.g., Chiste v. Hotels.com L.P.*, 2010 WL 4630317, at *7 (S.D.N.Y. Nov. 15, 2010) (attached as Exhibit B to the Second Kinney Decl.).

Second, the mere fact that documents can be transported to New York does not mean the location-of-documents factor favors Fteja. Virtually all documents can be transported. But litigating a case near the relevant documents—and the documents' custodians—reduces costs and saves time. Thus, this factor favors transfer.

Third, the main events in this case did not occur in New York. Fteja may have noticed that his account had been disabled in New York, but nothing else happened here. In contrast, all decisions and actions relating to Fteja's account occurred in California, where the Facebook systems and employees that reviewed Fteja's conduct, generated automatic alerts and limits on his use, and ultimately disabled his account are located. *See* Yang Decl. ¶ 3. Thus, this factor also strongly favors transfer. *See 800-Flowers, Inc. v. Intercontinental Florist, Inc.*, 860 F. Supp. 128, 135 (S.D.N.Y. 1994).

Fourth, Fteja may not escape his contractual duty to litigate in California because he is currently unemployed. "[A] party's financial status at any given time in the course of litigation cannot be the basis for enforcing or not enforcing a valid forum selection clause," *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 n.11 (7th Cir. 1993), and "[m]ere inconvenience and expense of travelling are not, standing alone, adequate reasons to disturb the parties' contractual choice of forum," *Elite Parfums, Ltd. v. Rivera*, 872 F. Supp. 1269, 1272 (S.D.N.Y. 1995) (internal quotation marks and citation omitted).

Fifth and finally, the fact that Fteja chose to file this case in New York should not weigh heavily in the Court's analysis. As explained in Facebook's opening brief, the importance of a plaintiff's forum choice is significantly reduced where, as here, the plaintiff has agreed to litigate in a different forum, *see P & S Business Machines, Inc.*, 331 F.3d at 807, and "the operative facts have few meaningful connections to the plaintiff's chosen forum." *Ayala-Branch v. TAD Telecom, Inc.*, 197 F. Supp. 2d 13, 15 (S.D.N.Y. 2002).

B. Fteja's Claims Should Be Dismissed under Federal Rule of Civil Procedure 12(b)(6)

1. Fteja's Discrimination Claim Is Conclusory and Meritless

Fteja's principal claim is that Facebook discriminated against him based on his religion (Muslim) and ethnicity (still unknown). *See* Compl. ¶ 14. Facebook moved to dismiss that claim because, among other things, Fteja failed to offer a single fact in support of it. In response, Fteja offers more conclusory assertions and promises to allege relevant facts at some point in the future. *See* Dkt. 17 at 3 (ECF pagination). He also adopts Fatouros's theory that the Turkish government exercises control over Facebook policy in order to discriminate against certain users. *Id.* That is not enough to avoid dismissal.

First, Fteja's promise to "provide the full complaint with evidence" someday is not enough to avoid dismissal now. *Id.* If Fteja had any facts to support his discrimination claim, he could have and should have alleged them by now. His failure to do so dooms his claim. *See Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949-50 (2009) (courts are "not bound to accept as true a legal conclusion couched as a factual allegation," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice") (internal quotation marks and citation omitted); *Bishop v. Henry Modell & Co.*, 2009 WL 3762119, at *3 (S.D.N.Y. Nov. 10, 2009) (even pro se complaints must state a plausible claim to relief) (attached as Exhibit C to the Second Kinney Decl.). In fact, a similar discrimination claim against Facebook was recently dismissed for precisely that reason. *See Young v. Facebook, Inc.*, No. 10-03579, slip op. at 6 (N.D. Cal. May 17, 2011) (plaintiff claimed that Facebook discriminated against her by terminating her account and failing to respond adequately to her complaints; court dismissed claim because plaintiff did "not allege any facts from which intentional discrimination may be inferred") (attached as Exhibit D to the Second Kinney Decl.).

Nor does Fteja help himself by adopting Fatouros's view that Facebook has been infiltrated by agents of the Turkish government. Even if that claim had some basis in fact—which it does not—it would not advance Fteja's claim. Allegations of discrimination against Fatouros and Greeks in general do not support allegations of discrimination against Fteja and Muslims in general. In fact, if believed, Fatouros's claims about Turkish influence would make Fteja's claims of anti-Muslim bias less plausible. After all, Turkey is a majority Muslim nation. *See* U.S. Cent. Intelligence Agency, The World Fact Book – Turkey, available at https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html (attached as Exhibit E to the Second Kinney Decl.).

2. Fteja Cannot Succeed on any Conceivable Tort Claim

Initially, Fteja alleged a breach-of-contract claim in addition to his discrimination claim. *See* Dkt. 7 at 9-11. When he realized that such a claim would bar him from opposing transfer pursuant to the forum-selection clause, he recast it as a tort claim. *See, e.g.*, Dkt. 17 at 38 (ECF pagination). Thus, he now accuses Facebook of intentionally inflicting emotional distress. *See* *id.* at 1 (alleging that Facebook "hurt my feelings, emotionally distressed me, assaulted my good reputation among my friends and family, and assaulted my rights"). Fteja's new tort claim should be dismissed because it is no more plausible than his old breach-of-contract claim.

Under New York and California law, the tort of intentional infliction of emotional distress requires—among other things—"extreme and outrageous" conduct and "severe" emotional distress. *See, e.g.*, *Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009); *Schafer v. Hicksville Union Free School Dist.*, 2011 WL 1322903, at *14 (E.D.N.Y. Mar. 31, 2011) (attached as Exhibit F to the Second Kinney Decl.). Fteja alleges neither. Disabling a user's free Facebook account for abusive behavior is not "extreme and outrageous" conduct; that label is reserved for conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46(d) (1965). Nor does Fteja allege emotional distress "so severe that no reasonable man could be expected to endure it." *Id.* § 46(j). At most, he alleges that Facebook "hurt [his] feelings" and "humiliate[d]" him. Dkt. 17 at 1-2 (ECF pagination). The tort simply does not reach such "annoyances, petty oppressions, or other trivialities." *Id.* § 46(d).

C. The Court Should Order Fteja to Provide a More Definite Statement of His Claims

Fteja frankly concedes that his complaint is too vague to permit Facebook to respond. *See* Dkt. 17 at 3 (ECF pagination) ("[A]s your Honor will ask me to provide more complete evidence, I will provide the full complaint with evidence and including witnesses and supports."). Thus, if the Court does not transfer or dismiss this case, it should at least order Fteja to provide a more definite statement of his claims under Federal Rule of Civil Procedure 12(e).

CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court transfer this case, dismiss this case, or at least order Fteja to provide a more definite statement of his claims.

Respectfully submitted,

DATED: May 18, 2011

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